

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 8, 1998

TO: Roy H. Garner, Regional Director, Region 28

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Rocky Mountain Holdings, L.L.C., d/b/a Eagle Airmed of Arizona, Case 28-CA-l4931

133-8100, 240-6737

This case was submitted for advice as to whether the Employer is subject to the jurisdiction of the Board or is subject to the Railway Labor Act.

The Employer is licensed by the FAA as an air taxi service, which operates emergency medical services (EMS) on contract and on-call bases for hospitals or public safety agencies. In 1997, the Employer had revenues of \$54 million; \$53 of that amount came from its EMS operations.

We conclude that the Section 8(a)(1) charge concerning an employee's discharge should be dismissed because the Employer is a "common carrier by air" subject to the Railway Labor Act.⁽¹⁾

Section 2(2) of the Act specifically excludes from the definition of employer "any person subject to the Railway Labor Act," and thus exempts such persons from NLRB jurisdiction. The Board has stated that "in view of this clear statutory language, the first step in considering our jurisdiction under the Act, when a claim of arguable RLA jurisdiction is raised, is the determination whether the employer is subject to the Railway Labor Act."⁽²⁾

The Board generally refers a case to the NMB for its opinion as to jurisdiction when the answer to the jurisdictional question is not clear.⁽³⁾ However, before deferring to the NMB, the Board will first examine if there is any basis for it to assert jurisdiction over the employer. Thus, the Board has asserted jurisdiction without NMB deferral when: (a) the NMB has previously declined jurisdiction in similar factual situations;⁽⁴⁾ or (b) the case involves employees of an employer under the RLA who are in no way engaged in transportation functions and whose work normally would be covered by the NLRA;⁽⁵⁾ or (c) the Board has normally exercised uncontested jurisdiction over the employer.⁽⁶⁾

Here, however, the NMB has previously exercised jurisdiction over similar air ambulance services that operate as common carriers. See, e.g., *Petroleum Helicopters*, 25 NMB 197 (1998); *Evergreen Helicopters*, 8 NMB 505 (1981). *Cardinal Drilling Company*, 20 NMB 474 (1993), is distinguishable. There, the NMB declined to exercise jurisdiction because the company's primary business was drilling for oil and gas and its air ambulance services were "sporadic and negligible."

In summary, since the Employer operates the type of business over which the NMB has asserted jurisdiction and almost all of the Employer's revenues derive from that business, we conclude that it is clear that the Employer is subject to the RLA, not to the NLRA. Therefore, no purpose would be served by holding the charge and requesting the

NMB's opinion as to whether it or the Board has jurisdiction over the Employer.⁽⁷⁾ Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

¹ See 45 U.S.C. Sections 151 First and 181.

² Federal Express Corp., 317 NLRB 1155 (1995).

³ See, *e.g.*, Chelsea Catering Corp., 309 NLRB 822 (1992).

⁴ See, *e.g.*, D & T Limousine Service, 320 NLRB 859 (1996); E.W. Wiggins Airways, 210 NLRB 996 (1974).

⁵ See, *e.g.*, Golden Nugget Motel, 235 NLRB 1348 (1978); Trans World Airlines, 211 NLRB 733 (1974).

⁶ United Parcel Service, 318 NLRB 778 (1995), *enfd.* 92 F.3d 1221 (D.C. Cir. 1996).

⁷ Compare Federal Express Corp., 323 NLRB No. 157, slip op. at 2 (1997)(" . . .we consider it prudent to seek the views of the NMB whenever the [jurisdiction] issue is not entirely clear").